No. 82-1523

In the

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE: JOHNS-MANVILLE ASBESTOS CASES
APPEAL OF: DR. SAMUEL S. KELLER

DR. SAMUEL S. KELLER,

Petitioner,

vs.

JOHN D. McDANIEL, et al.,

Respondents.

On Petition for Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The underlying case was brought in the United States District Court for the Northern District of Illinois on behalf of the respondents who are former employees and widows of former employees of the Johns-Manville Corporation plant in Waukegan, Illinois for injuries and deaths which occurred as a result of exposure to asbestos at the plant. The Petitioner was a plant physician at the Waukegan plant from 1923 until 1954, during which time he performed physical examinations and caused chest x-rays to be taken of respondents and respondents' decedents.

In February of 1982, attorneys for respondents learned of Petitioner's whereabouts, contacted him, and obtained a court-reported statement from him at his home. Respondents subsequently noticed his deposition for April 1, 1982. Before the deposition was to go ahead, counsel who had since been retained to represent Petitioner obtained permission from the district court to continue the deposition, so that he would have an opportunity to become familiar with the litigation.

On August 3, 1982, six (6) days before the deposition was to go ahead for a second time, Petitioner, through his attorney, presented to the district court his Motion to Enjoin the Taking of the Oral Deposition of Dr. Samuel S. Keller on the grounds that the deposition would subject Petitioner to potential health hazards. The district court denied his motion.

Petitioner then appealed to the Court of Appeals for the Seventh Circuit under 28 U.S.C. §1292 (a)(1) and 28 U.S.C. §1291. The Seventh Circuit ordered the parties to submit memoranda on jurisdiction, specifically address-

ing the question of whether "the district court order is really tantamount to an injunction which is appealable as of right." On December 9, 1982, the Seventh Circuit held that the order of the district court appealed from was a discovery order. The court then dismissed the appeal, concluding that they were without jurisdiction to hear it.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied, because the decision of the Court below denying appealability follows the applicable decisions of this Court and is not in conflict with decisions of other courts of appeals.

ARGUMENT

I.

Petitioner would have this Court believe that conflict on the question of the jurisdiction of the Court of Appeals to entertain the appeal of a non-party from an order directing the non-party to submit to a deposition now exists between the Tenth, Seventh, Fourth and Second Circuits. A survey of the case law shows that no such conflict exists.

Petitioner cites the decision by the Court below as being in direct conflict with the Tenth Circuit's decision in *Covey Oil Company* v. *Continental Oil Company*, 340 F.2d 993 (10th Cir. 1965), *cert. denied*, 380 U.S. 964, 85 S.Ct. 1110, 14 L.E.2d 155 (1965). The Court in *Covey Oil* did hold that a trial court's denial of a motion to quash subpoenaes issued to non-party witnesses was appealable under 28 U.S.C. §1291. However, the viability of the *Covey Oil* case has been questioned.

In *United States* v. *Ryan*, 402 U.S. 530 (1971), this Court upheld the long standing rule that one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena, but must refuse to comply and subject oneself to being cited for contempt in order to obtain a right to review. *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Alexander* v. *United States*, 201 U.S. 117 (1906).

> [W]e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the produc-

> tion of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.

United States v. *Ryan, supra,* at 532-533.

Petitioner cites this Court's decision in *DiBella* v. *United States,* 369 U.S. 121 (1962), as support for the *Covey Oil* case. In *DiBella* v. *United States, supra,* this Court held that immediate review was available from a denial of a pretrial motion for the return of seized property. However, in *United States* v. *Ryan,* 402 U.S. 530 (1971), this Court distinguished its decision in *DiBella* from cases like *Covey Oil* and the instant case. This Court noted that the *DiBella* case was one of a limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claim. In the instant case, as in *Covey Oil,* immediate review is available from a contempt proceeding.

The Tenth Circuit has subsequently questioned its own decision in the *Covey Oil* case. In *United States* v. *Feeney,* 641 F.2d 821 (1981), a non-party's motion to quash a subpoena duces tecum was denied and appealed. The appellant argued that the *Covey Oil* decision applied. The Tenth Circuit noted that the *Covey Oil* rule had been criticised. The Court went on to note that this Court had consistently held that an order denying a motion to quash a subpoena is not final and that the subpoenaed party is to make the choice between compliance and resistance with the possibility of contempt, citing *United States* v. *Ryan,* 402 U.S. 530 (1971). The Court then held that the denial of the motion to quash the subpoena was not reviewable.

The Seventh, Fourth and Second Circuits have all followed this Court's decision in *United States* v. *Ryan,* 402 U.S. 530 (1971), and its predecessors. The ruling of the Court below is in line with previous decisions in the Seventh Circuit. In *Ryan* v. *C.I.R.,* 517 F.2d 13, (7th Cir. 1975), *cert. denied,* 423 U.S. 892, 96 S.Ct. 190, 46 L.ED.2d 124 (1975), the Court upheld the rule that a non-party wishing to appeal an order compelling testimony must refuse to answer and subject himself to contempt, citing *Alexander* v. *United States,* 201 U.S. 117 (1906).

Although Petitioner states that the Fourth Circuit decision in *North Carolina Association of Black Lawyers* v. *North Carolina Board of Law Examiners,* 538 F.2d 547 (4th Cir. 1976) cited the *Covey Oil* decision with approval, that Court in fact came up with an opposite result. In that case non-party movants were refused a protective order forbidding certain discovery. Although the appellants cited to the *Covey Oil* decision, the Court stated that *United States* v. *Ryan,* 402 U.S. 530 (1971), was the foremost precedent on point. The Court then went on to hold that the order was not appealable under either 28 U.S.C. §1291 or 28 U.S.C. 1292, and that the appellant must either comply or suffer contempt sanctions.

The Second Circuit has on several occassions expressly rejected the *Covey Oil* decision in favor of this Court's long standing review-through-contempt rule. *United States* v. *Fried,* 386 F.2d 691 (2nd Cir. 1967); *Kaufman* v. *Edelstein,* 539 F.2d 811 (2nd Cir. 1976). The Petitioner attempts to distinguish the *Fried* case from the instant case on the basis that the Court had reservations about the sincerity of that particular appellant's motives. How-

ever, the language in the opinion reveals that the Court in *Fried* was not questioning that individual's motives in particular, but was following the historic rule that a witness' sincerity should be put to test before allowing him an opportunity for review.

> With the number of appeals having increased almost 70% in the last five years, ..., as against the much smaller growth in district court litigation, this is no time to weaken the historic rule putting a witness' sincerity to test of having to risk a contempt citation as a condition to appeal, however harsh its application may seem to appellant here.

United States v. *Fried, supra,* at 645.

Four other circuits have also expressly rejected the *Covey Oil* decision and have followed this Court's review-through- contempt doctrine of *Alexander* and its progeny. *In Re Benjamin,* 582 F.2d 121 (1st Cir. 1978); *Borden Co.* v. *Sylk,* 410 F.2d 843 (3rd Cir. 1969); *Gialde* v. *Time, Inc.,* 480 F.2d 1295 (8th Cir. 1973); *United States* v. *Anderson,* 464 F.2d 1390 (D.C. Cir. 1972).

The decision of the Court below regarding appealability under 28 U.S.C. §1291 is not in conflict with the decisions of other courts of appeals and it does not conflict with the applicable decisions of this Court. The decision in the instant case follows the great weight of authority. The only decision cited by Petitioner which is actually in conflict with the decision in the instant case is of questionable vitality. Therefore, review by this Court is not necessary.

II.

Petitioner's argument that the decision of the Court of Appeals in the instant case is in conflict with the statu-

tory language of 28 U.S.C. §1292 (a)(1) must be premised on an assumption that the district court's order denying the motion to enjoin the taking of Petitioner's deposition is tantamount to a refusal of an injunction. Petitioner's bold assumption ignores the fact that the precise question before the Court below was whether the order did constitute a refusal of an injunction. Furthermore, the case law interpreting the language of 28 U.S.C. §1292 (a)(1) makes it clear that the order entered by the district court in the instant case was merely an order regulating the conduct of discovery and was not an order refusing an injunction within the meaning of the statute.

Petitioner describes his motion to enjoin the taking of his deposition as a request for a permanent injunction. However, orders concerning the conduct of the litigation unrelated to the substantive issues in the action are not injunctions within the meaning of 28 U.S.C. §1292 (a)(1). *International Products Corp.* v. *Koons*, 325 F.2d 403, 406 (2nd Cir. 1963); *Rodgers* v. *United States Steel Corp.*, 541 F.2d 365, (3rd Cir. 1976).

The Court in *International Products Corp.* v. *Koons, supra*, dismissed an appeal from an order that sealed depositions and enjoined the defendants, the attorneys, and others from disclosing any of the testimony in the deposition. Following their prior decisions and previous decisions of this Court, the Second Circuit held that 28 U.S.C. §1292 (a)(1) was to be read as relating to injunctions which give or aid in giving some or all of the substantive relief sought by the complaint, and not as including restraints or directions in orders concerning the conduct of the parties or their counsel before trial, unrelated to the substantive issues in the case.

> As explained in *Baltimore Contractors, Inc.* v. *Bodinger, supra,* 348 U.S. at 181, 75 S.Ct. at 252 and *Grant* v. *United States, supra,* 282, F.2d at 169, such a constriction provides a better fit with the language of the statute, 'Where, upon a hearing in equity in a district court' as this first appeared in §7 of the Evarts Act, C. 517, 26 Stat, 828 (1891) and later in the Judicial Code of 1911, §129, 36 Stat. 1134, with the conclusion that the omission of the words 'in equity' in the Act of February 13, 1925, 43 Stat. 937 'was not intended to remove that limitation,' *Schoenamsgruber* v. *Hamburg American Line,* 294 U.S. 454, 457, fn.3; 55 S.Ct. 475, 477, 79 L.Ed. 989 (1935); and with the policy considerations which led Congress to create this exception to the federal final judgment rule.

Id. at 406-407.

In *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.,* 385 U.S. 23, 25 (1966), this Court reaffirmed that orders that do not touch on the merits of the claim, but only relate to pretrial procedures are not "interlocutory" within the meaning of 28 U.S.C. §1292 (a)(1), expressing concern for protecting the integrity of the Congressional policy against piecemeal appeals. In *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478 (1978), this Court cited the earlier decision in *Switzerland* with approval. In dismissing an appeal from a denial of class certification, this Court held that the statute created a narrow exception from the established policy against piecemeal appeals and that the exception did not embrace orders that have no direct or irreparable impact on the merits of the controversy. *Id.* at 480, 482.

The order in the instant case refusing Petitioner's motion to enjoin the taking of his deposition did not refuse ultimate injunctive relief sought by the claimants. The

order was totally unrelated to the substantive issues in the action and merely regulated the conduct of discovery. The Courts have held that an order directing the parties to proceed with due diligence to the taking of depositions is not appealable, (*Manuel San Juan Co.* v. *American International Underwriters Corp.*, 331 F.Supp. 1050 (1971), *aff'd on other grounds*, 494 F.2d 317 (1974)), and that an order quashing the taking of a deposition does not constitute an interlocutory injunction within the meaning of 28 U.S.C. §1292 (a)(1), (*Time, Inc.* v. *Ragano*, 427 F.2d 219 (5th Cir. 1970)).

The cases cited by Petitioner do not lend support to his position that the district court order was an order refusing an injunction. In *Allico National Corporation* v. *Amalgamated Meat Cutters & Butcher Workmen of North America*, 397 F.2d 727 (7th Cir. 1968) and *Clean Air Coordinating Committee* v. *Roth-Adam Fuel Co.*, 465 F.2d 323 (7th Cir. 1972), the Courts found that the orders appealed from were in effect refusals for preliminary injunctions, and were thus appealable under 28 U.S.C. §1292 (a)(2). However, in both of those cases an injunction was the substantive relief sought by the claimants, so the orders refusing the injunctive relief did relate to the merits of the plaintiffs' claims and did not merely relate to the taking of a step in the litigation. In *American Cyanamid Co.* v. *Lincoln Laboratories, Inc.*, 403 F.2d 486 (7th Cir. 1968) the issue was whether there was jurisdiction under 28 U.S.C. §1292 (a)(4). The Court did discuss 28 U.S.C. §1292 (a)(1), but their focus was on the lack of a finality requirement which is not the issue here.

The decision of the Court of Appeals in the instant case regarding appealability under 28 U.S.C. §1292 (a)

(2) follows the applicable decisions of this Court and the decisions of the other Circuits. Therefore, review by this Court is unnecessary.

CONCLUSION

There is no valid reason why this Court should review the decision of the Court below, since the decision follows the applicable decisions of this Court and is in line with decisions in the other Circuits on appealability under 28 U.S.C. §1291 and 28 U.S.C. §1292(a)(1). The order of the district court in the instant case is not appealable under 28 U.S.C. §1291, since it is merely a discovery order which lacks the requisite finality. Neither is it appealable under 28 U.S.C. §1292(a)(1), since the order does not fall into the narrow exception of subsection (1) allowing appeals from interlocutory orders of district courts refusing injunctions. The order was not tantamount to a refusal of an injunction, since it merely regulated the conduct of discovery and did not relate to the substantive issues in the case.

The Petitioner has not been denied access to review of the order of the district court. The cases are clear that he may obtain review from a contempt citation if he chooses to refuse to testify. This Court is aware of the problems facing a non-party desiring review of such an order. However, in order to protect the established policy against piecemeal appellate review which interrupts the litigation process, this Court has decided and continues to hold that a non-party may only obtain review from an order such as was entered by the district court in the instant case through review from a contempt citation.

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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